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In the Supreme Court of the United States

OCTOBER TERM, 1969

1018

ROBERT G. GORDON,
PETITIONER,

v.

SHEPARD A. SPUNT,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Opinions Below	1
Statutes Involved	2
Statement	3
Counter Statement of Questions Presented	4
Argument	4
I. When a Petition in Bankruptcy is proper on its face the Court has jurisdiction	4
II. Only the Alleged Bankrupt may oppose an involuntary petition in Bankruptcy	7
III. An adjudication in bankruptcy cannot be attacked in a collateral proceeding	9
IV. Gordon is not an aggrieved or interested party in the original petition in Bankruptcy Filed against John J. McCullough	11
Reasons for Denying the Writ	12
Conclusion	13

Table of Authorities

Cases

Abramson v. *Boedeker,* 379 F.2d 741, 746 (C.C.A. 5th, 1967)	10, 12
Binderup v. *Pathe Exchange,* 263 U.S. 291	6
In re Carden, 45 *A.B.R. (N.S.)* 258, 118 F.2d 677, 679 (C.C.A. 2nd, 1941)	7
Citizens National Bank of Lublock v. *Spear,* 292 F.2d 491 (C.C.A. 5th, 1953)	11, 12
Commercial Credit Corporation v. *Skutt,* 341 F.2d 177, 181 (C.C.A. 8th, 1965)	5, 8
In re First National Bank of Belle Fourche, 18 A.B.R. 265, 152 Fed. 64 (C.C.A. 8th, 1907)	10

Page

In re National Republic Co., 42 A.B.R. (N.S.) 132, 109 F.2d 167 (C.C.A. 7th, 1940) 7, 10

In re Plymouth Cordage Co., 13 A.B.R. 655, 135 Fed. 1000 (C.C.A. 8th) 6

Providence Box & Lumber Co. v. *Goodrich Daniels Lumber Corp.*, (D. Vt. 1948) 80 F. Supp. 61, 62 5

In re Security Motors Co., (D.C. W.D., Mo. 1943) 54 A.B.R. (N.S.) 521, 51 F. Supp. 559, 560 6

In re Sterling, 48 A.B.R. (N.S.) 468, 125 F.2d 104 (C.C.A. 9th, 1942) 10

Wynne v. *Rochelle*, 385 F.2d 789, 799 (C.C.A. 5th, 1967) 10

Statutes

Section 1 (2) of the Bankruptcy Act 2, 9

Section 18b of the Bankduptcy Act 2, 7, 9, 10, 12

Section 59b of the Bankruptcy Act 2

Section 59d of the Bankruptcy Act 2, 3, 12

Section 59f of the Bankruptcy Act 2, 3, 7, 9

Section 95 of the Bankruptcy Act 2

Section 18b of the 1898 Bankruptcy Act 2

Section 59 of the 1898 Bankruptcy Act 2

Textbooks

Collier on Bankruptcy 14th Edition Volume 2 p. 18 7

p. 181 9

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Petitioner seeks a writ of certiorari to review a final judgment of the United States Court of Appeals for the First Circuit entered November 10, 1969 which in a per curiam decision upheld the judgment of the District Court Judge directing that the Petitioner return to the Trustee in Bankruptcy preferential transfers.

Opinions Below

The opinions of the Courts below are adequate set forth in the petition.

Statutes Involved

This case involves Section 1 (2) of the Bankruptcy Act, Section 18b of the Bankruptcy Act; Section 59b of the Bankruptcy Act, Section 59d of the Bankruptcy Act and Section 59f of the Bankruptcy Act.

> "*Section 1(2)* — "Adjudication" shall mean a determination, whether by decree or by operation of law, that a person is a bankrupt."
> "*Section 18b* — The Bankrupt and, in the case of a petition against a partnership, any general partner or, in the case of a petition in behalf of a partnership, any general partner not joining therein, may appear and plead to the petition within five days after the return day or within such further time as the court may allow."

> "*Section 59b* — Three or more creditors who have provable claims not contingent as to liability against a person, amounting in the aggregate to $500 in excess of the value of any securities held by them, or, if all of the creditors of the person are less than twelve in number, then one or more of the creditors whose claim or claims equal that amount, may file a petition to have him adjudged a bankrupt; but the claim or claims, if unliquidated, shall not be counted in computing the number and the aggregate amount of the claims of the creditors joining in the petition, if the court determines that the claim or claims cannot be readily determined or estimated to be sufficient, together with the claims of the other creditors, to aggregate $500, without unduly delaying the decision upon the adjudication."

Section 59d — If it be averred in the petition that the creditors of the bankrupt, computed as provided in subdivision e of this section, are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses and a brief statement of the nature of their claim and the amounts thereof, and thereupon the Court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that the parties in interest shall have an opportunity to be heard. If upon such hearing it shall appear that a sufficient number of qualified creditors have joined in such petition, or if prior to or during such hearing, a sufficient number of qualified creditors shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."

"*Section 59f* — Creditors other than original petitioners may at any time enter their appearance and join in the petition."

Statement

On August 24, 1967 at 2:10 p.m. a creditor's petition in bankruptcy against John J. McCullough was presented to the Clerk of the District Court for filing and thereafter, on the same afternoon, pursuant to an Order of the District Court Judge, said petition was accepted for filing by the Clerk. The act of bankruptcy alleged was a preferential transfer to the petitioner on April 24, 1967. In due course McCullough was adjudicated a bankrupt and a trustee in bankruptcy was appointed. Thereafter the trus-

tee in bankruptcy filed a complaint in the United States District Court for the avoidance and recovery of the preferential transfer to the Petitioner. In said proceeding the Petitioner filed a motion to dismiss alleging that the preferenial transfer did not occur within four months from the date of the filing of the creditor's petition in bankruptcy, and that the petitioning creditor perpetrated a fraud when he alleged to the best of his knowledge that the bankrupt had less than twelve creditors, knowing that this fact was not true.

The District Court Judge denied the Motion to Dismiss in his Memorandum of Decision dated December 5, 1968, Appendix C)

On December 30, 1968 the Trustee's complaint on the preferential transfers was tried on its merits and in his Memorandum and Order dated March 31, 1969 Judge Murray ordered judgment on the finding that the transfers were voidable preferences, (Appendix D). The decree of the District Court was affirmed. (Appendix B).

Counter-Statement of Questions Presented

1. When a petition in bankruptcy is proper on its face has the Court jurisdiction of the parties?
2. Can anyone except the alleged bankrupt oppose an involuntary petition in bankruptcy?
3. May an adjudication in bankruptcy be attacked in a collateral proceeding?
4. Is Gordon, the Petitioner, an aggrieved or interested party in the original petition in bankruptcy filed against John J. McCullough?

Argument

I. When a Petition in Bankruptcy is Proper On Its Face the Court Has Jurisdiction.

The case of *Commercial Credit Corporation* v. *Skutt* 341 F. (2d) 177, 171 (C.C.A. 8th, 1965) is an excellent case which reviews many other decisions decided since the Chandler Amendment of 1938. On the question of jurisdiction, the Court stated the law as follows:

> "A defective petition in bankruptcy presents no different problem from a defective complaint generally. It does not deprive the Court of jurisdiction and is subject to amendment."

In the case of *Providence Box & Lumber Co.* v. *Goodrich Daniels Lumber Corp.* (D. Vt. 1948) 80 F. Supp. 61, 22, the Court stated the following:

> "Another contention is that the Court lacked jurisdiction because there were more than twelve creditors; that less than three signed the original petition and that the Referee erred in allowing other creditors to intervene. This position is clearly untenable.
> If less than three creditors file the petition it must be alleged that the number of creditors are less than twelve. Such an allegation may be made on information and belief since a petitioning creditor could hardly be expected to know such a fact with any great degree of certainty. If in answer to the petition it is asserted that there are in fact twelve or more creditors then section 59 sub. d of the Bankruptcy Act, 11 U.S.C.A. § 95, sub. d, provides the procedure to be followed.
> This section provides that in such a situation the Referee shall delay the hearing for a reasonable time, to the end that the parties in interest shall have an opportunity to be heard. If upon such hearing it shall appear that a sufficient number of qualified creditors have joined in such petition, or, if prior to or during

> such hearing, a sufficient number of qualified creditors shall join therein, the case may be proceeded with, but otherwise it shall be dismissed. . . . Creditors other than the original petitioners may at any time enter their appearance and join in the petition."

It was further stated *In re Security Motors Co.* (D.C. W.D., Mo. 1943) 54 A.B.R. (N.S.) 521, 51 F. Supp. 559, 560 that

> "A careful reading of all of Section 95 (11 U.S.C.A.) shows that it was contemplated by the Congress that a single, qualified petitioning creditor might reasonably be mistaken in an averment that there were less than twelve creditors in order to qualify such petitioner for instituting a bankruptcy proceeding. By paragraph (D) the answer of the alleged bankrupt might disclose a large number of creditors. In such event it was not contemplated that the petition should be dismissed but that the sole creditor might be joined by a sufficient number of other qualified creditors so as to warrant the further proceeding in bankruptcy. . . .
> This is not the usual case of fraud and deceit. No one was deceived by the averment to its disadvantage. The law contemplated that it might not be true and still not justify adverse action against the petitioner. According to the admitted facts the alleged bankrupt is insolvent and, moreover, while insolvent, it committed an act of bankruptcy. It should follow that the creditors had a legal right to compel bankruptcy."

See also *Binderup* v. *Pathe Exchange,* 263 U.S. 291.*In re Plymouth Cordage Co.* 13 A.B.R. 665, 135 Fed. 1000 (C.C.A. 8th) stated:

> "Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy or an insufficient complaint at law, accompanied by proper service upon the defendants, gives jurisdiction to the Court to determine the questions it presents, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the Court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff."

Collier on Bankruptcy, 14th Edition, Volume 2, Page 18. See also *In re National Republic Co.* 42 A.B.R. (N.S.) 132, 109 F. (2d) 167 (C.C.A. 7th, 1940)

The bankruptcy petition on its face alleged all the elements required by the Bankruptcy Act to have McCullough adjudicated a bankrupt and, therefore, the Court had jurisdiction.

II. Only the Alleged Bankrupt May Oppose an Involuntary Petition in Bankruptcy.

In the matter of Carden, 45 A.B.R. (N.S.) 258, 118 F. (2d) 677, 679 (C.C.A., 2d, 1941), cert. denied 314 U.S. 647, 62 S. Ct. 91, 88 L. Ed 519, the Court referred to the deletions made by the Chandler Amendment of 1938 in Section 18B and 59F and said:

> "The old act provided in Sec. 18, sub. b, that the bankrupt or any creditor might appear and plead to the

petition within five days after the return day or within such further time as the Court might allow. In Sec. 18, sub. b of the Chandler Act, this provision was changed by omitting the words "or any creditor". Similarly Sec. 59, sub. f of the old act, 11 U.S.C.A. § 95, sub. f, gave creditors, other than the original petitioners, the right to enter their appearance at any time and join in the petition or file an answer and be heard in opposition to the prayer of the petition. In Sec. 59, sub. f of the Chandler Act, the words 'or file an answer and be heard in opposition' were left out.... Any action under general principles of equity contrary thereto would be contrary to the statute and so erroneous. Consequently, the appellant was without standing to question the sufficiency of the petition."

In the case of *Commercial Credit Corporation* v. *Skutt*, (Supra) at page 179, the Court after reviewing cases which were decided after the 1938 Chandler Amendment stated the law as follows:

"In any event, the appellant as a creditor has no standing to oppose the adjudication of bankruptcy. This has not always been the rule. Under Section 18 Sub. (b) of the Bankruptcy Act of 1898, any creditor could appear and plead to a petition in involuntary bankruptcy. The Congress, however, by adoption of the Bankruptcy Act of 1938 (Chandler Act) rewrote the section of the bankruptcy law and eliminated the right of a creditor to be heard in opposition to an adjudication. (cases cited) This statutory withdrawal of a creditor's right in this particular has been recognized by the text writers as well as the courts."

There is no merit to the argument of the Petitioner that

Gordon, a creditor, may oppose the involuntary petition in bankruptcy against McCullough, as the Chandler Amendment of 1938 specifically prohibits such action by creditors under Section 18B and 59F of the Amendment.

III. An Adjudication in Bankruptcy Cannot Be Attacked in a Collateral Proceeding.

Adjudication is defined in the Bankruptcy Act Section 1 (2) as:

> "A determination, whether by decree or by operation of law, that a person is a bankrupt."

The bankrupt, having failed to contest the verity of the allegations contained in the bankruptcy petition, and having been adjudicated a bankrupt, the adjudication should not be disturbed for the reasons given in Collier on Bankruptcy, 14th Edition, Volume 2, Page 181, where the following is stated:

> "An adjudication of bankruptcy is a judgment in rem, a determination of the debtor's status as a bankrupt, binding upon all whether appearing in the proceeding or not. So far as it declares the status of the debtor, even strangers to the decree may not attack it collaterally. Hence, an adjudication may not be impeached in a collateral proceeding because of defects in pleading appearing on the face of the petition. Similarly, the adjudication may not be questioned collaterally on the ground that the petitioning creditor did not have a valid claim."

Thus, orders of adjudication have been uniformly sustained against collateral attack.

In the case of *First National Bank of Belle Fourche* 18 A.B.R. 26, 12 Fed. 64 (C.C.A. 8th), decided in 1907 prior to the Chandler Amendment of 1938, a creditor sought to overturn the adjudication and the Court said:

> "That judgment, therefore, conclusively estops the complaining creditors here and everywhere from proving the contrary to avoid the adjudication in bankruptcy until the latter is reversed or vacated in some direct proceeding. The adjudication in bankruptcy, in this case, therefore, until reversed or vacated in some direct proceeding, conclusively estopped all the parties to this proceeding, including the petitioning creditors here, from claiming from the record or upon evidence aliunde that the Widell Company was not principally engaged in the manufacturing pursuit and was not rightly adjudicated a bankrupt."

In re National Republic Co. (supra) the Court refused the stockholders and equity receiver the right to contest an involuntary petition against the corporation and cited Section 18B of the Chandler Amendment.

The order adjudicating McCullough a bankrupt is res judicata.

See *In re Sterling* 48 A.B.R. (N.S.) 468, 125 F. (2d) 104 (C.C.A. 9th, 1942)

In the case of *Wynne* v. *Rochelle* 38 F. (2d) 789, 799, (C.C.A. 5th, 1967) it was stated that:

> "It seems clear that under the statute a creditor . . . may not attack an adjudication."

It further reaffirmed the decision in the case of *Abram-*

son v. *Boedecker*, 379 F. (2d) 741, 746 (C.C.A. 5th, 1967) which stated:

> ". . . Since the creditor cannot oppose the petition directly, he ought not to have the right to gain the same benefit through a collateral attack."

It is quite apparent, therefore, that an adjudication in bankruptcy is res judicata and can be attacked only by the bankrupt in a direct proceeding. Furthermore, a creditor has no standing nor right in a collateral proceeding to attack the order of the Court adjudicating McCullough a bankrupt.

IV. Gordon is Not an Aggrieved or Interested Party in the Original Petition in Bankruptcy Filed Against John J. McCullough.

In the case of *Citizens National Bank of Lublock* v. *Spear* 202 F. (2d) 491 (C.C.A. 5th, 1953) the Bank sought to intervene in a bankruptcy proceeding for the purpose of filing a motion to vacate an adjudication. It was said by the Court:

> "The bank's petition shows on its face it is not a party in interest in said proceeding. If interested at all, it is only by virtue of being a preference creditor, or transferee of the bankrupt, whose debt was paid or satisfied prior to the filing of the involuntary petition in bankruptcy.... To be an interested party, the appellant must be affected or aggrieved by the order of adjudication. On the face of the record before us such order does not affect it unless it may be construed as adjudicating the bank to be preference creditor or transferee, and it is not susceptible of any such construction."

The facts in the instant case fall squarely within the case of the *Citizens National Bank of Lublock* v. *Spear* (supra) in which a preference creditor sought by an appeal to vacate an adjudication. The Court said that the Bank was not "an aggrieved or interested party" and denied it standing to contest the adjudication.

Petitioner Gordon is not, and never was, a party "entitled to appear and plead" because sections 18B and 45F of the Bankruptcy Act specifically have eliminated a creditor as a party "entitled to plead to an involuntary petition in bankruptcy."

As stated in *Abramson* v. *Boedeker* (supra) the court said:

> "The creditor cannot oppose the petition directly, he ought not to have the right to gain the same benefit through a collateral attack."

The Petitioner is seeking to retain his preferential transfer by attacking an Act of Congress, which specifically forbids the Petitioner, a creditor, from opposing or answering the original petition in bankruptcy filed against John J. McCullough.

Reasons for Denying the Writ

1. The United States Court of Appeals in its per curiam decision has described the appeal of the Petitioner as "totally frivolous". (Appendix A)

2. Since the 1938 Amendment to the Bankruptcy Act, Section 18B and 59D, certiorari has been uniformly denied to creditors seeking directly or indirectly to attack an

adjudication of a bankrupt, and the Petitioner has cited no case to the contrary.

Conclusion

The Petition for Certiorari should be denied.

Respectfully submitted,

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